Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Second Appeal No. 1228 of 2001
(Old No. 1194 of 1976)

1. Chheda Lal (Since deceased)
1/1 Smt. Kalawati Devi
W/o late Chheda lal
1/2 Chanra Singh
S/o late Chheda Lal
1/3 Nand Ram
S/o late Chheda Lal
1/4 Ghanshyam Singh
S/o late Chheda Lal
1/5 Ganesh Singh
S/o late Chheda Lal

2. Surji Lal
S/o late Sri Shyam Lal
R/o Village Mudeli,
Tehsil Khatima, District Nainital.

…… Plaintiffs/Appellants

Versus

Hardwari S/o Chote
R/o Village Mudeli,
Tehsil Khatima,
District Nainital.

… Defendant/Respondent

Mr. B.S. Khanka, learned counsel for the appellants.
Mr. V.K. Bist, Senior Counsel assisted by Mr. Tumul Nailwal, counsel for the respondent.

Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred as C.P.C.), is directed against the judgment and decree dated 02.07.1976,

Passed by the then learned Civil Judge, Nainital in Civil Appeal No. 112 of 1975 (N), whereby the judgment and decree dated 23.10.1975, passed by the trial court in Civil Suit No. 52 of 1975 is set aside and the Suit is dismissed. (This Second Appeal was filed before the Allahabad High Court in the year 1976 i.e. before Act No. 104 of 1976 amending C.P.C. came into force w.e.f. 01.02.1977, as such, no substantial question law as formulated in it and the Appeal is received by transfer under Section 35 of the U.P. Re-organization act, 2000 to this Court, for its disposal.)

2) Brief facts of the case are that plaintiffs (present appellants) field a suit before the trial court for permanent injunction restraining the defendant / respondent form interfering in their possession over plot No. 336 measuring 16 Bigha 7 Biswa of land, situated in Village Mundali. As per plaint case, the plaintiffs were sired on the date of institution of suit and they are in possession of the same. Defendant/respondent contested the suit and pleaded that the possession of the land in question was transferred to the defendant by the plaintiffs in the year 1967 and they executed an agreement of sale dated 13.05.1967 (Ext.A-3). It is further pleaded in the written statement that Rs. 4,000/- was accepted by the plaintiffs as consideration from the defendant. Defendant has further pleaded that he is in possession of the land in suit and, as such, the plaintiffs are not entitled to the relief of injunction claimed by them.

3) The trial court framed following two issues in the suit:

1. ***Whether, the plaintiff is sirdar in possession of the plot No. 336 measuring area 16 Bigha 7 Biswa situated in the village Mundali, if so, its effect?***
2. ***To what relief, if any, the plaintiff is entitled?***

4) After recording the evidence and hearing the parties, the trial court decreed the suit with the finding that plaintiff is sirdar in possession of the land in suit, and by alleged agreement of sale no land stood transferred to the defendant, nor the possession was transferred to him. With these findings the suit was decreed with costs and defendant was directed by the trial court not to interfere in possession of the plaintiffs (present appellants) over the land in suit. Against said judgment and decree dated 23.10.1975, passed in Civil Suit No. 52 of 1975 by the trial court (Munsif Nainital), Civil Appeal No. 112 of 1975 (N) was preferred by the defendant. The learned first appellate court (Civil Judge, Nainital) vide his judgment and order dated 02.07.1976, allowed the appeal and set aside the judgment and decree passed by the trial court, and dismissed the suit. Aggrieved by the same this Second Appeal is preferred by the plaintiffs.

5) I heard learned counsel for the parties and perused the entire evidence on record.

6) Admittedly, plaintiffs namely Chheda Lal and Surji Lal were siredar of the plot No. 336 measuring 16 Bigha 7 Biswa of land in village Mundali. It is also not disputed that they were in possession of said land in the year 1976, before the plaintiffs allegedly executed an agreement of sale (Ext. A –3) in favour of the defendant, after accepting a

consideration of Rs. 4,000/- from him. It is pertinent to mention here that under the U.P. Zamindari Abolition and Land Reform Act, 1950, no tenure holder except the Bhumidhar is entitled to transfer the land held by him. Plaintiffs being admitted sirdar were not competent in 1967, nor had any right to transfer the land held by them. As such, the trial court rightly found that by agreement of sale dated 13.05.1967 (Ext. A –3), no title stood transferred to the defendant.

7) Now, question arises whether the possession of the land was transferred by the plaintiffs or not, to the defendant in the year 1967, at the time of the execution of aforesaid document Ext. A –3. Though, the oral evidence adduced by the parties shows that there is evidence of oath against oath from both the sides, that they are in possession of the land in suit. In such circumstances, it is the documentary evidence which is to be looked into to see as to which of the party is actually in possession of the land in suit. Ext. 2, copy of Khasra of the year 1381 Fasli (1973), shows that the plaintiffs were still in possession of the land in suit, even after execution of the agreement of sale in the year 1967. Only in the Khasra of year 1382 Fasli (1974), for the first time an entry was made in favour of the defendant showing him in possession of the land in suit in class IX, which means the first entry made in faovur of the defendant regarding the possession in the year 1974 again there was no entry of defendant's possession in subsequent years by the revenue authorities. In the circumstances, the trial

court rightly found that the plaintiffs were the sirdar in possession of the land in suit and defendant had no right to interfere in their possession. The learned first appellate court has committed error of law in holding that the defendant was in possession of the land in suit on the basis of Ext. A –2. As such, the finding of the learned first appellate court is erroneous and against the evidence on record. Accordingly, the judgment and decree passed by the first appellant court is liable to be set aside.

8) For the reasons as discussed above, the appeal is allowed. The judgment and decree dated 02.07.1976, passed in Civil Appeal No. 112 of 1975 (N) by the Civil Judge, Nainital, is set aside. The judgment and decree passed by the trial court in Civil Suit No. 52 of 1975 is restored. No order as to costs.

(Prafulla C. Pant, J.)

Dt. 14th Aughust, 2006.
H. Negi